



**The Comptroller General
of the United States**

Washington, D.C. 20548

Silphody

Decision

Matter of: Servicemaster All Cleaning Services, Inc.

File: B-223355

Date: August 22, 1986

DIGEST

1. Agency decision to negotiate, requesting competitive proposals in lieu of sealed bids, is justified where the agency foresees a need for discussions and the basis for award reasonably includes technical considerations in addition to price and price-related factors.
2. Agency is not required to separately purchase services where the agency's overall needs can be most effectively provided through a "total package" procurement approach involving award of the total requirement to one contractor.
3. Air Force regulation concerning the development of a statement of work and quality assurance plan for base-level services contracts implements Air Force policy and is for the benefit of the government, not potential offerors. Therefore, the Air Force's alleged failure to comply with regulation does not provide a basis for protest.
4. Protest that solicitation provision for deductions under an Air Force Regulation 400-28 surveillance plan and under the Inspection of Services clause improperly penalizes contractor is denied where protester submits no evidence that the provision imposes an unreasonable measure of damages.
5. Protest which merely anticipates possible future agency action is speculative and will not be considered.

DECISION

Servicemaster All Cleaning Services, Inc. (SACSI), protests the terms of request for proposals (RFP) No. F05611-86-B0027, a small business set-aside, issued by the Department of the Air Force (Air Force) for janitorial services at the United States Air Force Academy. SACSI contends that the Air Force should solicit sealed bids instead of competitive proposals, that the Air Force should divide the solicitation's requirements so that small businesses may compete and that the RFP contains various improprieties.

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We deny the protest in part and dismiss the remainder.

Originally issued as an invitation for bids, the solicitation was converted to an RFP by amendment 003. SACSI contends that the use of competitive proposals instead of sealed bids violates the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301 et seq. (Supp. III 1985), and implementing regulations. SACSI asserts that the Air Force has historically used sealed bid solicitations for this type of contract.

The Air Force justifies its use of negotiated procedures on the need to evaluate proposals and conduct discussions to assure that offerors understand the RFP requirements. The Air Force cites past problems with formally advertised janitorial service contracts, noting that the most recent contractor was issued numerous contract discrepancy reports, two cure notices and one show cause letter. The Air Force believes the contractor did not understand the requirements, and argues future problems can be avoided by having offerors describe their understanding of requirements and their approach to accomplishing tasks.

SACSI responds that problems with prior contractors could be due to poor contract administration, and suggests that a two-step sealed bid procedure could weed out bidders who do not understand contract requirements. SACSI also asserts that it learned from the prior contractor's attorney that the specifications under the prior contract were defective, and that if the specifications were defective, it is not surprising that the contractor's performance showed a lack of understanding of contract requirements.

CICA eliminates the statutory preference for formally advertised (now "sealed bid") procurements, but provides specific criteria for determining whether sealed bids or competitive proposals should be requested. 10 U.S.C. § 2304 (Supp. III 1985); Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.401 (1985). The criteria in 10 U.S.C. 2304(a)(2) require an agency to solicit sealed bids if:

- "(i) Time permits the solicitation, submission, and evaluation of sealed bids;
- "(ii) The award will be made on the basis of price and price-related factors;
- "(iii) It is not necessary to conduct discussions with the responding offerors about their bids; and
- "(iv) There is a reasonable expectation of receiving more than one sealed bid."

In our judgment, the Air Force's determination not to conduct sealed bidding was permissible under subparagraphs (ii) and (iii) of this section. The basis for award here is not limited to price-related

factors; the Air Force also seeks to evaluate technical proposals containing specific information as to offerors' experience, and plans for staffing, training and quality control. Given these additional evaluation concerns and the Air Force's concomitant need to assure offeror understanding of requirements through discussions, the decision to use competitive proposal procedures is not legally objectionable. See United Food Services, Inc., B-220367, Feb. 20 1986, 86-1 C.P.D. ¶ 177; The Saxon Corp., B-221054, Mar. 6, 1986, 86-1 C.P.D. ¶ 225.

SACSI also protests that the solicitation's requirements are larger than many small businesses can conveniently handle and should be divided into several solicitations to allow increased competition as required by CICA and the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. 98-577, 98 Stat. 3066 (1984).

We have recognized that CICA generally requires that solicitations include specifications which permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1)(b)(ii) (Supp. III 1985); The Caption Center, B-220659, Feb. 19, 1986, 86-1 C.P.D. ¶ 174. Since procurements on a total package basis can restrict competition, we have objected to such procurements where a total package approach did not appear necessary to satisfy the agency's minimum needs. See, e.g., Systems, Terminals & Communications Corp., B-218170, May 21, 1985, 85-1 C.P.D. ¶ 578; MASSTOR Systems Corp., B-211240, Dec. 27, 1983, 84-1 C.P.D. ¶ 23. On the other hand, we have recognized that the possibility of obtaining economies of scale or avoiding unnecessary duplication of costs may also justify the total package approach. The Caption Center, B-220659, supra at 5 and 6, and cases cited therein. In this regard, we have found that CICA's requirement to increase the use of full and open competition is primarily a means to an end--that of fulfilling the government's requirements "at the lowest reasonable cost considering the nature of the property or service procured." 41 U.S.C. § 414(1) (Supp. III 1985); see H.R. Rep. No. 98-861, 98th Cong., 2d Sess. 1434 (1984); The Caption Center, B-220659, supra at 6. Nothing in the Small Business and Federal Procurement Competition Enhancement Act of 1984 prohibits a total package approach where such an approach is reasonably justified, The Caption Center, B-220659, supra, and therefore the decision whether to procure by means of a total package approach or to break out divisible portions of the total requirement for separate procurements, a matter generally within the discretion of the contracting agency, will not be disturbed absent a clear showing that the agency's determination lacks a reasonable basis. See Ronald Campbell Co., B-196018, Mar. 25, 1980, 80-1 C.P.D. ¶ 216; Secure Engineering Services, Inc., B-202496, July 1, 1981, 81-2 C.P.D. ¶ 2.

We find the Air Force's decision to procure by means of a total package approach has a rational basis. The Air Force states that 57 percent of the contract is for one building and it is not feasible to have more than one contractor in any building. The Air Force also reports that the use

of a consolidated contract will reduce administrative costs, and points out that it currently has a shortage of personnel performing contract administration and quality assurance functions. Also, there has been no showing that adequate competition will not be obtained on this small business set-aside procurement. On this record, we have no basis for objecting to the Air Force's procurement approach. Eastern Trans-Waste Corp., B-214805, July 30, 1984, 84-2 C.P.D. ¶ 126.

SACSI also contends that section 27 of the solicitation is defective because it provides for deductions from contractor payments under an Air Force Regulation (AFR) 400-28 surveillance plan and independently under the solicitation's inspection of services clause. SACSI asserts that this section directly conflicts with AFR 400-28, particularly paragraph 5-3a(3), and improperly penalized the contractor.

AFR 400-28, Vol. 1, September 26, 1979, establishes a policy of requiring contractors to institute their own quality assurance programs and of having the Air Force's quality assurance evaluator randomly sample the contractor's performance to assure that the program is operating effectively, with appropriate deductions from the contractor's payment for defects. The contractor generally is permitted a minimum number of defects for which no deduction will be taken. Paragraph 5-3a(3), AFR 400-28 provides that "Errors found in services not scheduled for observation should be brought to the contractor's attention, but not used to count as a defect for determining if the AQL has been met." (AQL refers to acceptable quality level, i.e., the maximum allowable deviation from requirements that may occur before the government will make deductions from the contract price.)

The Air Force argues that it will comply with AFR 400-28 and bring errors discovered independently of the surveillance plan to the contractor's attention, but will not use such discovered errors to compute whether the AQL has been exceeded. The solicitation provides that "the government may take deductions under the inspection of services clause independent of any other surveillance method." The Inspection of Services clause reserves the government's right to inspect all services, to the extent practicable, at all times during the term of the contract. The clause also provides that when defects cannot be corrected by reperformance, the government may reduce the contract price to reflect the reduced value of the services performed. As long as the Air Force keeps adjustments for deficiencies that are discovered independently of the surveillance plan separate and distinct from those uncovered by the surveillance plan, this will be consistent with AFR 400-28, paragraph 5-3a(3), since they are not being used to determine if the AQL has been met. See Larson Building Care Inc., B-209761, June 20, 1983, 83-1 C.P.D. ¶ 671.

Moreover, we have previously stated that AFR 400-28 sets out instructions for the benefit of government contracting personnel in developing a statement of work and quality assurance plan, and does not create any

rights for potential offerors. The agency's alleged violation of the regulation therefore does not provide a valid basis for protest. Environmental Aseptic Services Administration and Larson Building Care Inc., et al., 62 Comp. Gen. 219 (1983), 83-1 C.P.D. ¶ 194.

To the extent SACSI contends that section 27 of the solicitation improperly penalizes the contractor, we will object to a liquidated damages provision as imposing a penalty only if a protester shows there is no possible relation between the amounts stipulated for liquidated damages and the losses which are contemplated by the parties. Id. Since SACSI has submitted no evidence that the deduction provision imposes an unreasonable measure of damages, we have no basis to object to the provision.

SACSI also objects to the solicitation's requirement for the submission of resumes with proposals. SACSI argues that the requested data is indicative of the contractor's responsibility rather than the technical acceptability of the proposal, and that offerors should be able to submit the data after the closing date for receipt of proposals. Although employee resumes are ordinarily part of the technical evaluation of the proposals, the Air Force agrees with the protester in this case. The Air Force will not determine proposals submitted under this RFP that do not contain the requested resumes to be unacceptable, and will require the contractor to submit the requested data before award as part of the contracting officer's review of its responsibility.

In commenting on the agency report, SACSI questions whether the Air Force will refer a nonresponsibility determination to the Small Business Administration (SBA) under the certificate of competency procedures. A protest that merely anticipates agency action is speculative and will not be considered. See Resource Consultants, Inc., B-221858, Mar. 7, 1986, 86-1 C.P.D. ¶ 231. Accordingly, we have no basis at this time to consider SACSI's speculation over whether the Air Force will refer a nonresponsibility determination to SBA.

SACSI also contends that the initial phase-in work required by the solicitation is not specifically defined. We find that the Air Force has resolved SACSI's concern by amendment No. 5 to the solicitation, which specifies that phase-in work includes cleaning of all vinyl or asbestos floor surfaces, all carpeted surfaces, base boards, latrines, stairwells, wax and stripper splashed walls, and smudged walls, fixtures and glass.

Finally, SACSI notes that the solicitation lacks information concerning certain tasks are to be performed at the new visitor center and to CBPO. SACSI points out that the solicitation has yet to be completed because it provides that such information will be provided in forthcoming amendments. Since the Air Force has since provided the information in amendments No. 2 and 5, SACSI's protest on this issue is academic. See Halifax Engineering, Inc., B-219178, July 22, 1985, 85-2 C.P.D. ¶ 68.

The protest is denied in part and dismissed in part.

for Seymour E. Cross
Harry R. Van Cleve
General Counsel